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No. 94-2117

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

DEL KIDD; JUDY KIDD, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Date: September 25, 1995

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ARGUMENTS

I. The district court did not rule on the merits of Kidd's constitutional claims. The court's discussion of those claims was clearly meant only to determine jurisdiction and cannot be construed as a ruling on the merits.

Kidd's constitutional claims were dismissed in district court for lack of subject matter jurisdiction.[1] It is elementary that jurisdiction is the threshold issue in every case in federal court. If a court is without jurisdiction of the subject matter, it is without power to adjudicate and the only action it can take is to order dismissal of the complaint. *Stewart v. U.S.*, 199 F.2d 517 (7th Cir., 1952.) Furthermore, it is the duty of the district court to ascertain whether it has jurisdiction before proceeding to hear and decide any case on its merits. *Battaglia v. Gen. Motors Corp.* 169 F.2d 254 (2nd Cir. 1948).

Clearly, the district court could not have ruled on the merits of Kidd's constitutional claims because it did not accept jurisdiction to do so. All statements in the Government's Brief in Opposition declaring that the court found Kidd's constitutional claims lacked merit should, therefore, be disregarded.

The court's discussion of Kidd's constitutional claims cannot be construed as a ruling on the merits. The court discussed the claims only to determine jurisdiction:

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[1] The district court assumed that all of Kidd's claims involving freedom of speech and assembly and some related to due process were linked to his whistleblower claims which were appealable only to the Merit System Protection Board. (MSPB) The court held, therefore, that it lacked jurisdiction of those claims. Pet. App. A-25-26. Likewise, the district court held and the Ninth Circuit affirmed that it lacked jurisdiction to provide injunctive relief with regard to the issues of privacy, equal protection, and due process. Pet. App. A-6.

- In discussing Kidd's privacy claim, the court reviewed "some sort of constitutional violation related to privacy."[2] Pet. App.. A-23. It then dismissed the claim, not because it lacked merit, but because review by the court "would open the back door to judicial review to perhaps an overwhelming number of CSRA claims." Pet. App. A-24.

- In discussing Kidd's equal protection claims, the court held that because the CSRA "implicates no suspect class, the court's review is limited to determining whether the statute's scheme is rationally related to a legitimate government propose." Pet. App. A-25. Kidd's equal protection claim was dismissed not because it lacked merit but because of the "need to avoid the escalating costs and overcrowding in the federal court system." Pet. App. A-25.

- In discussing Kidd's claims related to speech, assembly, and due process, the court incorrectly assumed that all such claims would have been within the jurisdiction of the MSPB and that they would have been presented and adjudicated there. These claims, too, were dismissed for lack of jurisdiction not lack of merit. Pet. App. A-25-26.

With regard to Kidd's claims that the government's actions had deprived him of procedural due process, the court noted that all such "irregularities" had been brought before the OSC, which found no constitutional violation. The court then assumed jurisdiction to determine only the limited issue of whether the OSC had discharged its statutory duty to investigate. Pet. App. A-26.

In its Brief in Opposition, the Government argues that the instant case is "not an appropriate vehicle" to decide the question presented because "petitioner's constitutional claims are plainly without substance." Opp. Brief p. 10. The Government then bases that argument on the false assertion that the district court found the claims to lack merit. Since the district court could not

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[2] If the pro se Complaint reviewed by the court was incomplete or unclear as to evidence of specific claims, the Complaint can be amended to fully define the allegations.

and did not rule on the merits of Kidd's constitutional claims, the Government's argument should be dismissed as spurious.

II. Collateral estoppel and res judicata do not apply here because the MSPB refused jurisdiction of all of Kidd's constitutional claims and ignored his private First Amendment claims.

In its Brief in Opposition, the Government argues that the "Petitioner's First Amendment claim is . .. in essence a reprise of his claim that his supervisors retaliated against him for whistleblowing. That claim was presented to and rejected by the MSPB ..." Opp. Brief, p. 10. And further, "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." Citings omitted. Opp. Brief, p. 11.

The MSPB carefully limited its jurisdiction to exclude all of Kidd's claims that the agency's actions violated his constitutional rights.

After accepting jurisdiction of Kidd's 14-day suspension under the Whistleblower Protection Act (WPA), the MSPB excluded from review all issues dealing with or stemming from Kidd's having been placed on administrative leave, detailed out of his Yuma position, and transferred to Nevada, because those personnel actions occurred prior to July 9, 1989, the effective date of the WPA. Reply App. A-1 , and A-3[3]. With regard to Kidd's constitutional claims, the MSPB found that "appellant's claim that his constitutional rights have been abridged, in and of itself, is insufficient to bring this matter within the Board's jurisdiction... (The board does not have plenary jurisdiction.)" Reply App. A-8. And with regard to Kidd's claims of prohibited personnel practices, the MSPB found that "... as with the appellant's constitutional claim, the allegation that the agency has

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[3] The MSPB's Decision issued in this case is attached to this Reply Brief and referenced herein as Reply App.

committed a prohibited personnel practice is insufficient to bring this matter within Board jurisdiction." Reply App. A-9. Citings omitted. Nowhere does the MSPB Decision address or in any way adjudicate the issues of equal protection, due process, privacy or assembly.

With regard to Kidd's First Amendment claims, the MSPB distinguished between disclosures made in the public interest and protected under the WPA and those made solely in a private interest and not protected. Reply App. A-7. The distinction is especially significant in this case in that the MSPB Decision addresses only the issue presented by the agency and conspicuously ignores the disclosures that Kidd claimed evidenced whistleblowing.[4] Kidd's disclosures concerning allegations of agency wrongdoing in violation of his constitutional rights are all of a private nature and are, arguably, not protected under the WPA.

The Decision also ignores that fact that Kidd was suspended, in part, for having hosted a meeting in his home with a member of Congressman Morris Udall' staff and 14 fellow employees during which Kidd disclosed the agency's wrongdoing in his case and the others disclosed mismanagement and abuse of authority at the Yuma Project Office. Again, Kidd's disclosures

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[4] The reord showed that Kidd claimed his disclosures to the Secretary of the Interior and to two Congressmen -- that the agency had flagrantly violated the regulations governing his administrative leave, detail, and transfer and had violated the grievance regulations in his case -- constituted whistleblowing. These disclosures were contained in a six-page attachment to Kidd's September 11, 1989 letter to the Secretary with copies to the Congressmen. The letter was a contributing factor in Kidd's 14-day suspension. The same disclosures were made by Kidd to Congressman Morris Udal's staff person at a meeting hosted by the Kidds and attended by 14 fellow employees. The fact that Kidd hosted the meeting and made the disclosures was also a contributing factor in his 14-day suspension. The Government, on the other hand, claimed that the whistleblowing issue involved statements related to a fire at Kidd's home.

of abuse of authority and violation of regulation involved his private interests that the MSPB defined as unprotected by the WPA.

Since Kidd's private interest disclosures were not protected by the WPA and his First Amendment claim with respect to those disclosures was not adjudicated or in any way discussed by the MSPB, collateral estoppel and res judicata should not apply in the instant case.

III. The CSRA remedy does not provide adequate Article III protection.

It would seem undisputed that the CSRA provides no judicial remedy for a federal employee's job-related individual constitutional claims. The Government's statement of the relevant question concedes the point: "Thus, the question in this case ... is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be **augmented** by the creation of a **new judicial remedy** for the constitutional violation at issue." Citings omitted. [Emphasis added.] Opp. Brief, p. 8.

It would also seem undisputed that, insofar as the WPA applies to disclosures of **public** interest, it does not contravene Article III.

However, neither the CSRA nor the WPA protects the federal employee's private constitutional rights on the job. As noted by the district court, under the CSRA Kidd's only recourse for violations of his constitutional rights was to report them to the OSC as prohibited personnel practices and ask for an investigation. Pet. App. A-22. But,

> "the right to petition the OSC is a constitutionally inadequate remedy because its protections are wholly discretionary. The statute directs the Special Counsel to "receive any allegations of a prohibited personnel practice and ... investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. 5 U.S.C. §1206(a)(I). If the special Counsel concludes that such reasonable grounds exist, it

> is directed to report that conclusion to the MSPB, the agency involved, and the Office of Personnel Management. 5 U.S.C. § 1206 (c)(I)(A). Any further action is wholly discretionary: the Special Counsel need not submit recommendations concerning corrective action to the MSPB, and the MSPB need not order corrective action. 5 U.S.C.§1206 (c)(A)-(B). Thus an employee who alleges constitutional violations surrenders control of his claim to the Office of Special Counsel that has vast discretion not to prosecute his action. By law, all he can do is force the OSC to investigate and consider his case; he cannot even challenge the OSC's disposition of his claim or seek judicial review to determine whether it was arbitrary, capricious, or unsupported by substantial evidence.[5] Because this procedure does not guarantee relief for unconstitutional actions, even those taken in violation of "clearly established" constitutional law, the CSRA remedy is constitutionally inadequate.[6]

Individual constitutional rights are not public rights nor is their adjudication discretionary. So, unless federal employees have now become the new Dred Scotts, Kidd's constitutional claims must be heard in federal court.

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[5] Judicial review of the OSC's decision whether to pursue a case is limited at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry on which to base its disposition of the employee's petition." *Cutts v. Lowler*, 692 F.2d 138, 140. (D.C. Cir. 1982) Although *Cutts* concerned OSC inquiries into charges of violations of statutes and not of the Constitution, subsequent courts have assumed that the limitations on judicial review hold in constitutional cases as well. See e.g. *Spagnola v. Mathis*, 859 F.2d 223.

[6] Bivens Doctrine In Flux; Statutory Preclusion of a Constitutional Cause of Action: Harvard Law Review, Vol. 101:1251 at 1263-65. Applicable citings included.

CONCLUSION

The arguments presented in the Government's Brief in Opposition do not defeat those presented in the Petition. The petition for a writ of certiorari should be granted.

Respectfully submitted.

Del and Judy Kidd
Petitioners, pro se

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEM PROTECTION BOARD
DENVER REGIONAL OFFICE

DEL A. KIDD, Appellant,	)	
v.	)	DOCKET NUMBER DE122191W0210
DEPARTMENT OF THE INTERIOR Agency.	)	DATE: JUL 3 1991

Jerre Dixon, Esquire, Dixon & Snow, Denver, Colorado, for the appellant.
Bob Moeller, Esquire, Phoenix, Arizona, for the agency.

BEFORE
Steven L. Chaffin
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant seeks Board review of his 14-day suspension, effective July 16, 1990. *See* Appeal Record, Tabs 1 and 4-41. The appellant asserts Board jurisdiction over the matter appealed by claiming the protection of the Whistleblower Protection Act of 1989.

The appellant was given the opportunity to present evidence and argument on the issue of whether he was a whistleblower under 5 U.S.C. § 2302(b)(8). And, because of allegations made by the appellant, a hearing was held on June 26, 1991. The appeal record closed upon the completion of the hearing.

For the reasons stated below, I find that the appellant is not a whistleblower and I DISMISS the appeal of his 14-day suspension.

ANALYSIS AND FINDINGS

Factual Background

Most of the facts of this case are undisputed. *See* Appeal Record, Tab 21 (Stipulated Facts). The appellant served in the position of Environmental Specialist, GS-12, in the Lower Colorado Division of the Bureau of Reclamation. On July 16, 1990, the appellant was suspended for 14 days for repeatedly accusing his former supervisor -- Ray Pritchett -- of setting fire to the appellant's home on August 26, 1989, and for writing a letter to prospective witnesses on April 13, 1990.

These accusations, as set forth in the notice of proposed removal, first occurred on the night of the fire, August 26, 1989. *See* Appeal Record, Tab 4-4M. Then, on the next Monday morning, August 28, the appellant and his wife secured injunctions against Pritchett and David Gudgel -- the appellant's second line supervisor -- in the Yuma, Arizona Municipal Court.[1] These injunctions indicated that Pritchett and Gudgel were to stop all acts of intimidation, threats, bodily harm, or acts causing property damage. *See* Appeal Record, Tab 5-4AA. The injunction also noted the fire at the appellant's house and stated a belief that Pritchett was capable of such arson.

Then, on September 11, 1989, the appellant wrote a letter to Manuel Lujan, Secretary of the Interior. *See* Appeal Record, Tab 5-4Y. In that letter, the appellant indicates that he suspected Pritchett and Gudgel of starting the fire at his house on August 26, 1989.

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[1] These injunctions were obtained *ex parte* and without a hearing. Thus, I do not consider the granting of the injunctions by the Yuma Municipal Court to be probative evidence that the allegations contained therein in support of the injunction were true.

In March of 1990, the appellant sought a renewal of the injunction against Pritchett and Gudgel. In seeking this renewal, the appellant raised the same accusations against the two individuals.

Finally, the notice of proposed suspension cites an April 13, 1990, letter the appellant wrote to 30 prospective witnesses for a grievance hearing.[2] That letter, noting the withdrawal of the grievance, suggests that the witnesses might also be subject to harassment by Pritchett and Gudgel. *See* Appeal Record, Tab 4-4Q.

Other, less germane facts, are also undisputed. The appellant had difficulty working under Pritchett's supervision for several years. During this period, reprimands were issued, grievances filed, and hearings held. This series of events presumably ended in July of 1989, when the appellant was reassigned from the agency's Yuma, Arizona office to the agency's Boulder City, Nevada Office.[3] This reassignment occurred approximately three weeks before the fire at the appellant's Yuma residence.

In 1990, the appellant sought review of his suspension by the Office of Special Counsel (OSC). However, on January 2, 1991, the OSC notified the appellant that it would take no further action on his complaint. The appellant was informed of his right to seek corrective action from the Board, and did so on March 7, 1991.

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[2] The parties are in agreement that the letter was erroneously dated March 13, 1990, and should have been dated April 13, 1990.

[3] It is undisputed that all of the "personnel actions" leading up to the appellant's reassignment, including the reassignment itself, were effected or proposed prior to July 9, 1989, the effective date of the Whistleblower Protection Act. Thus, they are not subject to review here under that Act. See *Herring V. Department of the Treasury*, 44 M.S.P.R. 673, 675 (1990), aff'd 918 F.2d 186 (Fed. Cir. 1990) (Table); *Marshall v. Department of Veterans Affairs*, 44 M.S.P.R. 28, 31-33 (1990).

Applicable law

In order to establish a claim of retaliation for whistleblowing, an employee must show that he made a protected disclosure and the disclosure was a "contributing factor" in the agency's decision to effect the personnel action. See 5 U.S.C. §1221(e)(1); *Christopher v. Defense Logistics Agency*, 44 M.S.P.R. 264, 271 (1990); *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 569 [sic] (1990). Here, there can be no disagreement that the appellant's disclosures were a contributing factor in his 14-day suspension: the suspension action was specifically taken for those disclosures.[4] Thus, the issue before me is whether the appellant's disclosures as set forth in the notice of proposed suspension were "protected" disclosures under the Whistleblower Protection Act of 1989.

Analysis

The agency's suspension action can be divided into two parts. The first part relies on the appellant's repeated accusations of arson against Pritchett and Gudgel. Specifically, these accusations occurred on August 26, 1989 -- the night of the fire -- to police and fire officials; on the Monday following the fire in the request for a court injunction; in the September 11, 1989 letter to Secretary Manuel Lujan; and in March 1990, when the appellant sought to renew the injunctions against Pritchett and Gudgel.

The second part of the agency's suspension action involves the appellant's letter dated April 13, to prospective witnesses. The issuance of this letter raises different issues and will be discussed later.

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[4] The appellant cites earlier protected disclosures with regard to his several grievances with the agency. However, the appellant presented no evidence to show that these earlier disclosures were a contributing factor in the agency's decision to suspend him for 14 days. Moreover, it is not clear that the disclosures made are of the type which can be considered protected.

The central issue with regard to these accusations of arson against Pritchett and Gudgel is whether they constituted a violation of the law and weather the appellant reasonably believed he was reporting such a violation. *See* 5 U.S.C. §2302(b)(8). The test for such "reasonable belief" is not the subjective belief of the appellant/discloser. Rather, it is whether a "reasonable person in the appellant's position would believe that the matter reported was protected. *See Special Counsel v. Hoban*, 24 M.S.P.R. 154, 160 1984).[5]

Thus, the instant case must be examined not from the appellant's perspective, but from the perspective of a reasonable person, confronted with the appellant's circumstances and the evidence available to the appellant. And, based on the evidence presented, I find that a reasonable person could not have "reasonably believed" the accusations made.

To support his accusations, the appellant first alludes to a conversation he had with several fellow employees some 18 months before the fire. *See* Hearing Tape (the appellant's testimony). During this conversation, which involved Pritchett's alleged harassment, one of the fellow employees stated that Pritchett would stop at nothing, even burning a residence, to harass employees. *See* Id.

This statement, according to the appellant, formed the basis for his belief that Pritchett had committed arson. Yet, this fellow employee apparently did not provide any factual basis to support his supposition; it was apparently nothing more than an unsubstantiated opinion.

Moreover, as noted, while the appellant and Pritchett had been having difficulties in the workplace, no evidence has been produced to show that these difficulties ever occurred outside the workplace. That is, even assuming arguendo that Pritchett harassed the appellant, and I do not make this assumption, the appellant has presented no evidence to show that Pritchett had

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[5] I note that this case was issued prior to the Whistleblower Protection Act of 1989. However, the language of the statute requiring that the employee "reasonable [sic] believe" his disclosure is unchanged by the Act.

ever said or done anything to suggest that he was capable of such activities outside the mantle of work supervision.

The appellant next justifies his accusations by asserting that he was only cooperating with law enforcement officials. That is, the appellant claims that on the night of the fire, both the Fire Marshal and the investigating police officer suggested that the fire was arson and asked for the names of suspects. Thus, the appellant was only complying with these law enforcement officials by providing his supervisors' names.

However, while the appellant testified that he was asked to provide such information, he has submitted no evidence to show that the Fire Marshall or the Police Officer ever asked for such information on the night of the fire.[6]

In fact, the final police report indicates that the fire was due to "unknown" causes.[7] *See* Appeal Record, Tab 5-4AB. And, the report of the investigating police officer suggests that the appellant first raised the specter of arson, and that the appellant and his wife suggested that Pritchett and Gudgel might be involved. *See* ID.

More importantly, I note that the available evidence provided at least one alternative to arson and should have suggested caution to the appellant in making his accusations. First, the appellant had recently been reassigned from Yuma, Arizona, to Boulder City, Nevada. Thus, the appellant was no longer living in his former Yuma residence -- his daughter was-- and the evidence shows that Pritchett was not even aware of the

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[6] I note that the parties stipulated that the Fire Marshall found that the fire was arson. However, I am unable to find any evidence of this in the appeal record. Nor was I able to find any record of the appellant's conversation with the Fire Marshall on the night of the fire.

[7] During his testimony, the appellant indicated that insofar as the fire was arson, he had become the prime suspect because of certain discrepancies in his story and that he was deemed to have failed a lie detector test on the matter. See Hearing Tape (the appellant's testimony.)

appellant's presence in Yuma on the night of the fire. *See* Id.

Further, on the day of the fire, the appellant's son-in-law had cleaned the storage room where the fire started. See Id; see also Hearing Tape (testimony of Judy Kidd). This cleaning involved the stacking of paint and other combustible materials. While these chemicals were ultimately found not to be the cause of the fire, the possibility of such an occurrence was extant at the time of the fire.

I am also disturbed by the fact that on the Monday after the fire, and then some two weeks later when he wrote to Secretary Lujan, the appellant repeated his charge of arson without any apparent attempt to check with the police or fire department to ascertain the development of evidence. In fact, the appellant stated that he had been unable to secure a copy of the police report and did not see one until provided by the agency in its adverse action file. *See* Hearing Tape (the appellant and Judy Kidd's testimony). I note, however, that the agency was able to obtain a report of investigation without any apparent difficulty.

Having reviewed the appeal file and specifically the appellant's testimony at the hearing, I find not one scintilla of credible, probative evidence available either now or at the time f the fire, which would suggest that Pritchett and/or Gudgel were involved in the fire at the appellant's home. Thus, I find that a reasonable person could not have reasonably believed that Pritchett and Gudgel had started the fire at the appellant's home. As suggested by the agency in its closing argument, the appellant's statements appear to be unfounded suspicions rather than a reasonable belief.

Accordingly, I conclude that the appellant's accusations against Pritchett and Gudgel in this regard are not "protected disclosures" within the coverage of the Whistleblower Protection Act. And, because of this conclusion, I make no finding on whether the appellant's accusations were in the public interest - those types of disclosures Congress intended to protect through the Act -- or solely in his private interest. *See Berube v. General Services Administration*, 30 M.S.P.R. 581, 596 (1986) vacated on other grounds, 820 F2d 396 (Fed. Cir, 1987).

The appellant also argues that his communication letter to Secretary Lujan must be accorded protection "on its face" as 1st

Amendment free speech and a disclosure of a violation of the law. However, as found above, the appellant's accusations of arson are not "protected disclosures." and, the appellant's claim that his constitutional rights have been abridged, in and of itself, is insufficient to bring this matter within the Board's jurisdiction. *See Saunders v. Merit System Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985) (the Board does not have plenary jurisdiction).

The final basis for the 14-day suspension is the appellant's letter to approximately 30 fellow employees who were to appear as witnesses at this grievance hearing. *See* Appeal record, Tab 4-4Q. In that grievance the appellant was attempting to show that he was being harassed. However, on the second day of the hearing, before calling many of the requested witness [sic] to testify, the appellant withdrew the claim of harassment.[8] *See* Appeal Record, Tab 5-4R (Vol 3 of the grievance transcript, pg. 130). Yet, he still wrote to these individuals to outline his continuing plans and to warn the employees of potential harassment.

Having reviewed this letter, I do not believe it contains a protected disclosure. *See* Appeal Record, Tab 4-4Q. Rather, the appellant is complaining of the agency's alleged harassment toward him rather than any disclosure of specific mismanagement. Nothing the appellant disclosed in this letter effectuated the purposes of 5 U.S.C. § 2302(b)(8). *See Berube*, 30 M.S.P.R. at 596. That is, any disclosures made involved only the furtherance of the appellant's case, not the public interest. Thus, I find that they were not protected disclosures. *See Williams v. Department of Defense*, 46 M.S.P.R. 549, 553-54 (1991); *Oliver v. Department of health and Human Services*, 34 M.S.P.R. 465, 472 (1987), aff'd 847 F.2d 842 (Fed. Cir. 1988) (Table)..

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[8] The parties stipulated to this matter but essentially agreed to disagree. My reading of the hearing transcript convinces me that the agency's position -- the appellant withdrew the claim of harassment -- is the correct one. *See* Appeal Record, Tabs 5-4R and 21.

Moreover, insofar as the appellant claims that the agency is retaliating against him under 5 U.S.C. § 2302(b)(9) -- reprisal for having written this letter in connection with his grievance, I disagree. The credible evidence of record shows that at the time the appellant wrote these letters he had withdrawn his grievance. Moreover, as with the appellant's constitutional claim, the allegation that the agency has committed a prohibited personnel practice is insufficient to bring this matter within Board jurisdiction. *See Hunter v. Department of the Army*, 40 M.S.P.R. 449, 451 (1989).

Finally, I note that the appellant alleges that the agency's actions against him constitute age discrimination. While it is not clear that the appellant is specifically raising this argument with regard to his 14-day suspension, I would simply note that the Board lacks jurisdiction over such an allegation in the absence of an appealable matter. *See Perlmutter v. Department of the Air Force*, 41 M.S.P.R. 38, 39 (1989). Thus, because the Board does not have jurisdiction over the appellant's 14-day suspension, or any of the other personnel actions taken against the appellant, it cannot consider this allegation of discrimination.

Summary and conclusion

In sum, I find that the appellant is not entitled to the protection of the Whistleblower Protection Act because the disclosures he made -- accusations of arson against his supervisors and the letter he issued to prospective witness -- are not protected by the Whistleblower Protection Act. That is, the appellant could not have "reasonably believed" the accusations of arson, and the letter he wrote to prospective witnesses was in his personal interest, not the public interest.

Further, the appellant's 14-day suspension, standing alone, is not an agency personnel action over which the Board had jurisdiction. *See* 5 U,S. C. § 7512(2); *Gosa v. United States Postal Service*, 43 M.S.P.R. 11, 13 (1989). The appellant's suspension was reviewed only because of his allegation that the personnel action was in retaliation for his whistleblowing activity. However, having found that the appellant is not a whistleblower, the appeal must be deemed as outside the Board's subject matter jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Steven L. Chaffin
Administrative Judge